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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. ———

JAMES A. MURRAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether sovereign immunity precludes judicial review by the federal courts of Internal Revenue Service determinations which invalidate, for the purposes of 26 U.S.C. §6337(b)(1), liens established under state law.

2. Whether the Internal Revenue Service must conform to the requirements of the Due Process Clause of the United States Constitution in denying one's status as a redemptioner under 26 U.S.C. §6337(b)(1).

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James A. Murray, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 26, 1982.

OPINIONS BELOW

The opinion of the United States District Court for the District of North Dakota is printed in Appendix B, hereto and is reported at 520 F.Supp. 1207 (D.N.D. 1981). The opinion of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the District

Court, is printed in Appendix A, page A-1, hereto and is not yet reported

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 26. 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether sovereign immunity precludes judicial review by the federal courts of Internal Revenue Service determinations which invalidate, for the purposes of 26 U.S.C. §6337(b)(1), liens established under state law.

2. Whether the Internal Revenue Service must conform to the requirements of the Due Process Clause of the United States Constitution in denying one's status as a redemptioner under 26 U.S.C. §6337(b)(1).

STATUTES INVOLVED

This case involves the United States Constitution, Amendment V; 26 U.S.C. §§6337-6339; 28 U.S.C. §§1346, 1361, 2674, 2680, and N.D. Cent. Code §32-17-01. Because these provisions are lengthy, their pertinent text is set forth in Appendix G, pages G-1 to G-10.

STATEMENT OF THE CASE

A Factual Statement

On December 20, 1978, Fireside, Inc., mortgaged the real estate in question to Petitioner, James A. Murray (Murray), and some of Murray's family members. Mur-

ray filed the mortgage with the Cass County Register of Deeds on the same date. In addition to Murray's mortgage, the real estate was encumbered by prior judgment liens, federal tax liens and a mortgage to the Casselton State Bank, Casselton, North Dakota. Subsequent to December 20, 1978, the Internal Revenue Service (IRS) filed additional tax liens.

On April 18, 1979, the property was seized for nonpayment of taxes. The property was sold to the Respondent. United States (U.S.), for the highest bid at the tax auction. In view of Murray's interest in the property, and long before the redemption period expired, Murray on August 13, 1979, pursuant to the requirements of 26 U.S.C. §6337(b) (1), tendered a check to the IRS in the amount of $320.00 which was the amount necessary for the redemption of the real estate. (See Appendix C, page C-1.) The IRS rejected the tendered redemption funds on the basis that Murray's mortgage was invalid, which, it asserted, disqualified Murray as a §6337 redemptioner. (See Appendix D, page D-1.) Again on September 9, 1979, Murray tendered the necessary funds and pointed out that the IRS had no standing to object to the mortgage, and that he did have the status of a redemptioner. (See Appendix E, page E-1.) Despite Murray's consistent assertion of his right to redeem, the IRS repeated its refusal of the tendered funds. (See Appendix F, page F-1.)

The redemption period expired on October 6, 1979, with Murray unable to get the IRS to recognize his redemption rights. The U.S. received a deed to the Fireside, Inc., property on November 30, 1979. On December 27, 1979, Murray filed his claim for damages with the IRS. Prior to the denial of his claim, the U.S. sold its interest

in the property to the Casselton State Bank. Following this sale, the IRS on April 1, 1980, denied Murray's claim for damages. The denial prompted the commencement of the present action for the recovery of damages suffered by Murray as a result of the IRS's wrongful denial of Murray's right to redeem or, in the alternative, a setting aside of the U.S.'s transfer of the real estate and compelling it to recognize Murray's redemption of the Fireside, Inc., property.

B. Procedural Statement

On December 27, 1979, Murray submitted his administrative claim for damages with the IRS in Fargo, North Dakota. Murray's claim for $70,000.00 was based on the valuation of the security he held on the Fireside, Inc., property which was lost when the IRS refused to recognize his right of redemption. Murray's claim was denied. An action was commenced in the Federal District Court for the District of North Dakota on September 30, 1980. Jurisdiction was based upon 28 U.S.C. §§1340, 1346, 1361, 1402, and 2410. The District Court, without deciding whether Murray's mortgage was valid or invalid, dismissed the action stating that it lacked jurisdiction to hear the matter as no waiver of sovereign immunity applied to Murray's claims. More specifically, it noted that Murray's claim for damages under §1346 could not be heard as it was a "claim arising in respect of the assessment or collection of any tax. . .". *Murray v. United States*, 520 F.Supp. 1207, 1210 (D.N.D. 1981) *citing* 28 U.S.C. §2680(c). Also, it concluded that mandamus relief under §1361 provided no waiver of immunity. *Id. at* 1209.

On appeal, the Court of Appeals affirmed the District Court pointing out that waivers of sovereign immunity must be explicit, and that §2680(c) barred Murray's claims for civil damages or mandamus. The Court of Appeals also decided that Murray's due process claim, for the IRS's failure to afford him a hearing on the denial of his redemption rights, did not remove the barrier of sovereign immunity. Consequently, the District Court and the Court of Appeals concluded that Murray was barred from any remedy against the U.S., as the purchaser of the Fireside, Inc., property, for its refusal to accept his redemption of the property.

REASONS FOR GRANTING WRIT

This case presents a situation which has not been directly addressed by this Court. It raises serious federal questions as to the avenues available to an individual to enforce his rights as a redemptioner under federal law. Through an overbroad construction of an exception to Congress' waiver of sovereign immunity under the Federal Torts Claims Act, the Court of Appeals has prevented individuals, such as Murray, from seeking an enforcement of their rights as redemptioners under federal law and to preserve their interest in property that has been seized for non-payment of taxes. The Court of Appeals has foreclosed such individuals from both legal and equitable remedies where the U.S. is the entity which refused to honor one's redemption rights. This conclusion is contrary to decisions of the United States Court of Appeals for the Tenth Circuit and other lower courts that recognize that redemption rights can be enforced in the federal courts. Finally, the Court of Appeals' decision is contrary to

this Court's prior decisions which hold that an implied cause of action exists in the Fifth Amendment to the United States Constitution to enforce one's due process rights.

It is clear that §6337(b) (1) gives the status of redemptioner to "any person having any interest" in property which has been seized and sold for non-payment of taxes. As a mortgagee of the Fireside, Inc., Murray certainly fell within this definition and acquired the status of a redemptioner once the Fireside, Inc., property was sold and purchased by the U.S.[1] In its own prior decisions, the Court of Appeals recognized that one's right to redeem is a property right. *Buss v. Prudential Ins. Co. of America*, 126 F.2d 960, 968 (8th Cir. 1942). *See also. McLean v. Federal Land Bank of Omaha*, 130 F.2d 123 (8th Cir. 1942). The loss of such a right must afford a remedy to the injured party or, at a minimum, not be taken without affording the affected party a hearing on the matter. As the following discussion will show, the Court of Appeals' decision left Murray with no remedy for; or an opportunity to be heard about, the loss of his property rights. The denial of both a remedy and an opportunity to be heard is sufficient reason for the granting of this writ.

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[1]The District Court specifically noted that it would not decide whether Murray's mortgage was valid. Thus, the Disrict Court's opinion would be applicable regardless of the validity or invalidity of the lien in question. *Murray v. United States*, 520 F.Supp. 1207, 1208 (D.N.D. 1981), n. 1.

I.

The Court of Appeals' Broad Construction of 26 U.S.C. §2680(c) Precluded Murray as a Non-Taxpayer Interested Person from Seeking any Judicial Review or Remedy for the Internal Revenue Service's Invalidation of His Interest in Property Seized for Non-Payment of Taxes.

This action stems from the IRS's unilateral decision that ruled Murray's mortgage to be invalid, and that he would not qualify as a person with an interest in the Fireside, Inc., property so as to be considered a redemptioner under §6337(b) (1).[2] The IRS's determination was made on an in-house basis without any hearing, presentation of evidence or input by Murray. Murray's action under the Federal Torts Claim Act would have brought this determination before a court where such a "judicial" determination should have been made. Such action was necessary as the failure to redeem would result in a deed being issued to the U.S., as the purchaser, under 26 U.S.C. §6338, which would have the effect of voiding Murray's interest in the Fireside, Inc., property.[3] Therefore, in order

[2]The language of 26 U.S.C. §6337(b)(1) permits "any person having an interest therein, or a lien" on the property seized to redeem the same. Murray's mortgage at a minimum qualified as an interest in the property. Nowhere does the language of the statute give any governmental agency the power, let alone non-reviewable power, to determine the validity of the asserted interest or lien.

[3]Under 26 U.S.C. §6339(c), a deed issued pursuant to 26 U.S.C. §6338 discharges the "property from all liens, encumbrances, and titles over which the lien of the United States with respect to which the levy was made had priority." The Court of Appeals relied upon the decision of *Capital Savings Association v. Runnels*, 361 So.2d 458 (La. App. 1978), in support of its decision. The *Runnels* decision clearly shows and reiterates the effect a §6339 deed has on interests in property sold for taxes. As pointed out by the *Runnels* court, the discharging effect of a §6339 deed applied equally to federal and state court proceedings concerning subsequent claims against the property. Thus, to prevent this total voiding of his interest, Murray had to redeem.

to obtain some type of judicial review of the IRS decision, Murray had to seek to compel the U.S., as the purchaser, to honor his valid redemption, or if this could not be done due to the subsequent conveyance, to pay damages for the wrongful deprivation of his property rights.

Murray's action under the Federal Tort Claims Act, 28 U.S.C. §1346(b), and mandamus statute, 28 U.S.C. §1361, was appropriate under the circumstances. The tort claim was an alternative remedy which would compensate Murray for the loss of his property rights if the loss could not be undone through mandamus. The United States Court of Appeals for the Tenth Circuit has previously recognized that one, whose redemption of property sold at a federal tax sale is wrongfully rejected, may bring an action to enforce that right. *See Guthrie v. Curnutt*, 417 F.2d 764 (10th Cir. 1969). While *Guthrie* involved a private individual as purchaser, the express purpose of the 28 U.S.C. §2674 waiver of sovereign immunity was to treat the U.S. the same as private individuals under similar circumstances. Consequently, the Eighth Circuit Court of Appeals should have recognized an equal right in Murray to enforce his redemption rights where the U.S. rather than an individual was the purchaser. *See also, DiFoggio v. United States*, 484 F.Supp. 233 (N.D. Ill. 1979).

Rather than afford Murray a remedy, the Court of Appeals broadly construed the exception to the §2674 waiver of sovereign immunity embodied in 28 U.S.C. §2680(c). It was an unjustified expansion of §2680(c) for the Court of Appeals to conclude that Murray's claims to enforce his redemption rights constituted a claim arising from the "assessment or collection of any tax". Murray was not contesting the assessment or collection of the taxes owed

by the Fireside, Inc. Indeed, the taxes are paid upon the sale of the property.[4] Redemption rights are a matter between the purchaser at the sale and certain identified individuals who have an interest in the property. The redemption period is not part of the tax assessment and collection process. By ruling that it is, the Court of Appeals disregarded this Court's admonition that waivers of sovereign immunity are to be liberally construed, and exceptions to the waiver were not to be broadened by refinement or construction. *See United States v. Muniz*, 374 U.S. 150 (1963), and *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

The Court of Appeals' broad application of §2680(c) deprived Murray of the only two possible remedies available. That is, either the U.S. must be forced to recognize his redemption or, if the subsequent conveyance to the Casselton State Bank which disregarded the redemption could not be undone, the U.S. must compensate Murray for the loss. Under the Court of Appeals' decision, the IRS's determination as to the validity of a lien established under state law cannot be reviewed. As a result, the IRS has unbriddled discretion to avoid interests in real property seized for non-payment of taxes without ever affording the affected parties either an opportunity to be heard or a remedy for the loss. This Court should not permit sovereign immunity to be used as a shield by the IRS where its

[4]In circumstances where a private individual purchases at a tax sale the tax would be paid by tendering the purchase price. In the present case, the U.S., as the purchaser, traded the taxes owed for a certificate of sale which would enable it to obtain a deed to the property. In both situations, the purchaser's purchase is subject to the rights of others to redeem. The right of redemption, however, does not alter the fact that the taxes were paid upon the actual purchase of the property. Therefore, the tax assessment and collection process is complete on the sale of the property.

conduct unjustifiably deprives one of a valuable property right. There must be a remedy.[8]

II.

The Internal Revenue Service Was Required to Follow the Basic Principles of Due Process in Its Determination of the Validity of Murray's Mortgage, and Murray Was Entitled to Maintain An Action to Enforce Such Rights or Be Compensated for a Violation of These Rights.

The Fifth Amendment to the United States Constitution forbids the deprivation of property rights "without due process of law." As shown in the previous discussion, Murray lost a valuable property right solely because the U.S. refused to accept his redemption of the Fireside, Inc., property. The loss stemmed from the unilateral in-house decision of the IRS. At no time was Murray afforded an evidentiary hearing or the opportunity to present evidence supporting the validity of his mortgage. Nor was he informed of the evidence relied upon by the IRS or given an opportunity to rebut this evidence. It is a basic principle of the Fifth Amendment Due Process Clause that be-

[8]The Court of Appeals in its opinion indicates that Murray may have a remedy via a quiet title action under N.D. Cent. Code §32-17-01 (1976 Repl.). The text of this section is set out in Appendix G. Such a statement is contrary to the Appeal Court's reliance on *Runnels*. As indicated in note 3, *supra*, failure to redeem from a tax sale voids junior lienholder's interests upon the issuance of a §6339 deed. This effect applies to any subsequent claim made by would-be redemptioners in federal or state court proceedings. Consequently, Murray's inability to get the U.S. to recognize his redemption of the Fireside, Inc., property and the issuance of a §6339 deed to the U.S. caused Murray to lose any standing he may have had under §32-17-01. That is, he no longer has the requisite estate, interest, lien, or encumbrance upon the Fireside, Inc., property to have standing to commence an action under §32-17-01.

fore property interests can be taken, the affected party must have an opportunity to be heard at a meaningful time and manner. *See Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Goldberg v. Kelly*, 397 U.S. 254 (1970). The unilateral ex parte decision of the IRS failed to meet this standard.

Murray's action merely sought redress for the violation of his constitutional rights either by requiring the U.S. to recognize and accept his redemption or compensate him for the loss. As shown previously, he had no other remedy, and the federal courts certainly had jurisdiction to fashion a remedy for such a constitutional violation. This Court's decision in *Davis v. Passman*, 442 U.S. 228 (1979), reiterated the concept that it is the judiciary which has the power to enforce constitutional rights. Where an individual such as Murray has no other means to enforce his rights, a cause of action is implied under the Fifth Amendment giving the courts power to protect the constitutional rights of the individual. *Id.* at 242-243 In view of this implied cause of action set out in *Passman*, the Court of Appeals should not have relied upon §2680 (c) to uphold the unconstitutional conduct of the U.S. through its IRS agents.[8]

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[8] *International Telephone & Telegraph Corp. v. Alexander*, 396 F. Supp. 1150 (D. Del. 1975). In *ITT*, the plaintiff sought judicial review of the IRS's revocation of certain private letter rulings. The defendant challenged the court's subject matter jurisdiction on the basis of statutes which would bar such a suit. Recognizing that the letter rulings constituted a property interest, the *ITT* court pointed out that their revocation would have to be made in accordance with due process rights, and that before they could be revoked the affected party was entitled to be heard. *Id.* at 1166. The court concluded that statutes which could be construed as barring a review of the IRS's decision could not be relied upon to prevent such a suit where there was no other meaningful opportunity to be heard. That is, statutes barring a suit could not be interpreted to compel an unconstitutional result. *Id.* Similarly, the Court of Appeals should not have relied upon the sovereign immunity doctrine to bring about an unconstitutional result.

The Court of Appeals' decision foreclosed Murray from any remedy or opportunity to be heard on a decision which cost him a valuable interest in the Fireside, Inc., property. Neither the U.S., the Court of Appeals, or the District Court showed in what respect Murray had adequate alternative avenues of relief, or that Congress has provided a statutory remedy to replace Murray's right to enforce his due process rights with respect to his right to redeem the Fireside, Inc., property. Such a showing was necessary to bar Murray's implied cause of action under the Fifth Amendment Due Process Clause. *See Carlson v. Green*, 448 U.S. 14 (1980). Therefore, the Court of Appeals should have recognized the inherent power of the federal courts to fashion a remedy for constitutional rights violations and reversed the District Court's dismissal of Murray's action.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 81-2178

James A. Murray,

Appellant,

v.

United States of America,

Appellee.

Appeal from the United States District Court for the District of North Dakota

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Submitted: March 12, 1982

Filed: August 26, 1982

Before ROSS, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and HENLEY, Circuit Judge.*

HENLEY, Senior Circuit Judge.

This appeal arises from the district court's[1] dismissal of

*The Honorable J. Smith Henley assumed senior status on June 1, 1982.

[1]The Honorable Paul Benson, Chief Judge, United States District Court for the District of North Dakota. His decision is reported as *Murray v. United States*, 520 F. Supp. 1207 (D. N.D. 1981).

appellant James A. Murray's complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12 (b). Murray seeks $70,000.00 in civil damages, or, alternatively, an order compelling the United States to convey to him certain real property which he had attempted to redeem following its conveyance to the United States at a tax auction. The district court held that subject matter jurisdiction was lacking because the United States had not waived its sovereign immunity.

We agree with the district court that upon the pleadings and undisputed facts neither civil damage relief nor mandamus is available to appellant. Moreover, while we do not accept the trial court's characterization of the action as one to quiet title, we affirm the judgment of dismissal.

Background.

The essential facts are not in dispute. On December 20, 1978 the appellant Murray took a mortgage on real estate owned by Fireside, Inc., a North Dakota corporation operating as a bar and lounge. The mortgage was executed by Donald Paul, a large stockholder and president of the corporation, and was duly recorded in the office of the Register of Deeds of Cass County on the same date. The property was subject to a prior mortgage to the Casselton State Bank on which there was owing the sum of $92,130.07, and was subject also to IRS tax liens and other judgment liens. The IRS filed additional tax liens after December 20, 1978.

On April 18, 1979 the property was seized by the IRS for nonpayment of taxes. The property was later purchased by the United States at a tax auction for the amount of the statutory calculated bid, $301.84, pursuant to 26

U.S.C. § 6335(e) (1). Appellant did not bid at the auction nor does he challenge the validity of either the tax lien or the auction sale.

On August 13 and December 9, 1979 appellant sent letters to the IRS, enclosing a check for $320.00 (the amount of the government's purchase price plus some interest) and asking to redeem the property. See 26 U.S.C. § 6337.[1] IRS officials on both occasions refused to permit the redemption and returned the checks. It was the IRS's position that the property of the corporation had been improperly given by a shareholder to secure an individual debt. The IRS noted that the transaction had not been approved by the corporation's Board of Directors, and that the mortgage was executed without consideration to the corporation. The Internal Revenue Service concluded that the mortgage was invalid, and hence that it was ineffective to trigger the redemption rights created by 26 U.S.C. § 6337.

On December 27, 1979 appellant filed a claim for damages with the IRS. The IRS denied this claim on April 1, 1980. The Service also sold its interest in the property to the Casselton State Bank for $301.84 in February, 1980. We are informed by appellant's brief that the property was subsequently transferred to a new purchaser on December 17, 1981.

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[1]Section 6337 provides in pertinent part:

(b) *Redemption of real estate after sale.*

(1) *Period.* The owner of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 120 days after the sale thereof.

On September 30, 1980 appellant commenced this suit in district court, seeking damages for the allegedly wrongful refusal of his redemption offer. In the alternative, he sought a writ of mandamus compelling the United States[5] to convey the real property to him and to void all prior deeds it had given on the property.

Appellant asserted jurisdiction under 28 U.S.C. §§ 1340 (civil action arising under Act of Congress providing for internal revenue), 1346 (Federal Tort Claims Act), 1356 (seizure under law of the United States), 1402 (venue statute applicable to suits under Federal Tort Claims Act), 2410 (quiet title action against United States), and 1361 (petition for mandamus). The government moved to dismiss the complaint on the ground that the suit was barred by the doctrine of sovereign immunity. The district court dismissed appellant's complaint on this ground while expressly declining to reach the question whether appellant's mortgage was valid. *Murray v. United States*, 520 F. Supp. 1207, 1208 n.1 (D.N.D. 1981).

(A) Damage Relief.

We approach the jurisdictional issues from the perspective of the relief requested by appellant. We consider first whether Murray's prayer for damage relief is well-founded in any of the cited statutes.

(i) Federal Tort Claims Act.

Appellant bases his claim to damage relief primarily on the jurisdisction provided by the Federal Tort Claims

[5]Appellant's original complaint named the District Director of the Internal Revenue Service as defendant. Defendant filed a motion to dismiss, alleging that the IRS is not an entity subject to suit. Appellant subsequently amended his complaint to substitute the United States as party defendant.

Act, 28 U.S.C. § 1346(b) (hereinafter FTCA), which waives the immunity of the United States with respect to suits alleging injury or loss of property through the negligent or wrongful act or omission of a United States employee.* The waiver provided by section 1346(b) is limited, however, by a number of exceptions set forth in 28 U.S.C. § 2680. Two of the exceptions are said by the government to apply here.

The government relies first on Section 2680(c), which preserves sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax."

Appellant proposes a narrow construction of the exception, arguing that tax collection efforts were complete when the property was conveyed to the United States at the tax sale for the statutorily calculated minimum bid. He points out that he has not challenged as improper the IRS's assessment of taxes against the Fireside, Inc. He thus urges the conclusion that this lawsuit arises from rights which postdate the government's collection efforts. Allegedly, his legal action will not interfere with these efforts. Appellant also argues that the exception to FTCA jurisdiction stated in Section 2680(c) bars only taxpayer suits. The exception allegedly does not apply to suits by third parties whose interests may be affected by tax collection efforts.

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*28 U.S.C. § 1346(b) provides in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The weight of authority is to the contrary. *E.G., United States v. Worley*, 213 F.2d 509, 512 (6th Cir. 1954) (exception in § 2680(c) barred suit by taxpayer's wife), *cert. denied*, 348 U.S. 917, 918 (1955); *Broadway Open Air Theatre, Inc. v. United States*, 208 F.2d 257, 258-59 (4th Cir. 1953) (exception barred suit by preferred stockholders of corporation where taxpayers were principal officers, directors and shareholder); *Home Indemnity Co. v. Brennan*, 430 F. Supp. 828 (S.D. N.Y. 1977) (exception barred suit by contractor's surety where taxpayer was the contractor). In a case closely on point, *Pargament v. Fitzgerald*, 272 F. Supp. 553, 556 (S.D. N.Y. 1967), *aff'd*, 391 F.2d 934 (2d Cir. 1968), the court specifically noted that Section 2680(c) precluded suit by a chattel mortgagee who alleged that his rights had been impaired by tax collection proceedings against his mortgagor. The exception to FTCA jurisdiction clearly applies to taxpayers and third parties alike.

We also cannot agree that appellant's claim arises outside of "the assessment or collection of taxes" for purposes of the exception to FTCA jurisdiction. When at a tax sale property is adjudicated to the government at the statutory minimum price, see 28 U.S.C. § 6335(e) (1), the government in effect becomes the purchaser subject to the statutory right of redemption. 28 U.S.C. § 6337(b) (1). *Capital Savings Association v. Runnels*, 361 So.2d 458, 462 (La. Ct. App. 1978). The right of redemption arises only in connection with the tax levy, and is an integral facet of such a levy. A claim founded on redemption

rights is clearly a claim "arising in respect of the collection of a tax" within the meaning of Section 2680(c).[5]

(ii) Sections 1340, 1356.

The other statutes relied on by appellant as grants of jurisdiction for a damage action are equally of little avail. Appellant argues that his suit may be heard under 28 U.S.C. § 1340, which gives the federal district courts "original jurisdiction of any civil action arising under any Act of Congress providing for Internal Revenue." It is established, however, that this general grant of jurisdiction does not constitute a waiver of sovereign immunity. *Aqua Bar & Lounge, Inc. v. United States Department of Treasury Internal Revenue Service*, 539 F.2d 935, 937 (3d Cir. 1976); *Essex v. Vinal*, 499 F.2d 226, 231 (8th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975) (and cases cited therein); *Geurkink Farms, Inc. v. United States*, 452 F.2d 643, 644 (7th Cir. 1971); *Falik v. United States*, 343 F.2d 38, 40 (2d Cir. 1965). There is similarly no waiver or sovereign immunity to be found in 28 U.S.C. § 1356, which is merely another general provision vesting jurisdiction in the district courts over certain kinds of seizures.[6]

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[5] Because we find that Section 2680(c) applies to preserve the sovereign immunity of the Unitted States from suit under the Federal Tort Claims Act, we do not reach the question whether Section 2680(a) might also apply. This subsection preserves the United States immunity by excepting from the Federal Tort Claims Act those claims based upon the performance of a discretionary function or duty by a federal employee or agency.

[6] 28 U.S.C. § 1356 (1980 Supp.) provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

Van Buskirk v. United States, 206 F. Supp. 553, 555 (E.D. Tenn. 1962).

(iii) Implied Waiver of Immunity.

Moreover, we cannot agree with appellant that a waiver of sovereign immunity must be implied where it is alleged that the IRS has failed to comply with seizure and sale provisions in the Internal Revenue Code. Appellant relies primarily on the reasoning of the dissent in *Aqua Bar & Lounge, Inc. v. United States Department of Treasury Internal Revenue Service*, 539 F.2d at 942-43. The dissent in this case was concerned that absent an implied waiver of immunity, the IRS would be free to violate Congressional mandates with impunity. *Id.* at 942. While we are similarly concerned that any injury which may here exist not be without a remedy, we cannot agree that a remedy should be provided through an implied waiver. A waiver of immunity "cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States v. King*, 395 U.S. 1, 4 (1969) Such a waiver, if it exists at all, should be sought in the statute giving rise to a cause of action. *Doe v. Civiletti*, 635 F.2d 88, 94 (2d Cir. 1980); *May Department Stores Co. v. Smith*, 572 F.2d 1275 (8th Cir.), *cert. denied sub nom. May Department Stores Co. v. Veterans' Administration*, 439 U.S. 837 (1978).

(iv) Federal Question Jurisdiction.

Appellant finally alleges that the refusal of his offer of redemption unconstitutionally deprived him of due process rights. The actions of government officials are said to have raised a substantial federal question within the sub-

ject matter jurisdiction of the district court. 28 U.S.C. § 1331. The existence of federal question jurisdiction, however, does not remove the barrier of sovereign immunity urged by the government against proceeding with this suit. *Doe v. Civiletti*, 635 F.2d at 94; *Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972).[7]

In sum, we can find no cognizable ground for jurisdiction over appellant's damage action.[8]

(B) Equitable Remedies.

(i) Mandamus.

As an alternative to money damages, appellant requested that the district court issue a writ of mandamus

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[7]We need not decide here the jurisdictional result that might obtain if appellant named individual agents of the Internal Revenue Service, rather than the Service or United States, as defendants in a count requesting damages for due process violations. However, we observe in passing that even if sovereign immunity did not necessarily bar such a cause of action, *see Davis v. Passman*, 442 U.S. 239 (1979), jurisdiction might still be defeated due to the existence of special factors or due to the existence of other remedies. *Id.* at 245-47; *Carlson v. Green*, 448 U.S. 14, 18-19 (1980). Moreover, defenses of either absolute or qualified immunity likely would be placed at issue. *E.g., Terrapin Leasing, Ltd. v. United States*, 449 F. Supp. 7, 8 (W.D. Okla. 1978).

[8]Although appellant does not press on appeal his assertion of jurisdiction under the statute providing for tax refund suits, 28 U.S.C. § 1346 (a)(1), we note that this provision also provides no jurisdiction. Although sovereign immunity is waived by this provision in conjunction with 26 U.S.C. § 7422, the present suit cannot fairly be said to fall within its ambit. Standing to sue under Section 1346(a)(1) extends only to the taxpayer from whom the tax was allegedly wrongfully collected. *E.g., Hummel v. United States*, 494 F. Supp. 1003, 1004 (S.D. Ia. 1980) (and citations therein); *First National Bank v. United States*, 175 F. Supp. 192 (D. Minn. 1959) (no standing for assignee of taxpayer), *appeal dismissed with prejudice*, 282 F.2d 568 (8th Cir. 1960). Appellant also does not seek relief of the kind provided for by Section 1346(a)(1), namely "recovery of [a] tax alleged to have been erroneously or illegally assessed or collected."

Appellant similarly is not aided by a cause of action under 26 U.S.C. § 7426, which permits civil actions by persons other than taxpayers who claim an interest on property allegedly wrongfully levied upon. Appellant does not allege that this is an instance of wrongful levy.

compelling the Unitted States to set aside all deeds it had given and convey the property to him. The federal mandamus statute, however, is of no help to appellant for several reasons.

First, it is debatable whether 28 U.S.C. § 1361[*] constitutes a waiver of sovereign immunity. *Doe v. Civiletti*, 635 F.2d at 94 (Section 1361 is not an all-purpose waiver of immunity); *Watson v. Blumenthal*, 586 F.2d 925, 935 (2d Cir. 1978); *Hill v. United States*, 571 F.2d 1098, 1101 n.5 (9th Cir. 1978); *Essex v. Vinal*, 499 F.2d at 231-32; *McQueary v. Laird*, 449 F.2d 608, 611 (10th Cir. 1971); *see also* 14 C. Wright, *Federal Practice and Procedure* § 3655 at 200 (1976) ("Section 1361 has not had any direct impact on the doctrine of sovereign immunity"). *but see Vishnevsky v. United States*, 581 F.2d 1249, 1255-56 (7th Cir. 1978) (doctrine of sovereign immunity inapplicable to actions for mandamus).

Moreover, even if sovereign immunity were waived by 28 U.S.C. § 1361, no federal officials are named as defendants in appellant's amended complaint. The Mandamus Act does not apply to the United States itself. *Morpurgo v. Board of Higher Education*, 423 F. Supp. 704, 714 (S.D. N.Y. 1976).

(ii) Action to Quiet Title, 28 U.S.C. § 2410.

Appellant's amended complaint did not expressly contain a prayer for quiet title relief. It is clear from the record, however, that the parties and the district court con-

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[*] 28 U.S.C. § 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

strued the suit as seeking such relief. 520 F. Supp. at 1209-10. The final question on appeal accordingly is whether this suit may properly be characterized as a quiet title action, and, if so, whether the district court had jurisdiction under 28 U.S.C. § 2410(a) (1)[10] in combination with 28 U.S.C. § 1340.[11]

We hold that appellant's suit may not appropriately be characterized as a suit to quiet title.

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[11] 28 U.S.C. § 1340 grants the district courts "original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue."

[10] 28 U.S.C. § 2410(a)(1) provides in pertinent part:

> Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—
>
> (1) to quiet title to, . . .
>
> real or personal property on which the United States has or claims a mortgage or other lien.

This section has been recognized to waive sovereign immunity in some circumstances. *United Sand & Gravel Contractors, Inc. v. United States*, 624 F.2d 733, 738 (5th Cir. 1980) (stating in dictum that Section 2410 may waive immunity as to suits disputing ownership to property possessed by United States when claimant has no more specific remedy); *Hudson County Board of Chosen Freeholders v. Morales*, 581 F.2d 379, 382-83 (3d Cir. 1978) (Section 2410 is basis for finding waiver of sovereign immunity); *Aqua Bar & Lounge, Inc. v. United States Department of Treasury Internal Revenue Service*, 539 F.2d 935, 938-40 (3d Cir. 1976) (Section 2410 constitutes waiver of sovereign immunity so long as plaintiff refrains from contesting merits of underlying tax assessment); *Popp v. Eberlein*, 409 F.2d 309, 312 (7th Cir.), *cert. denied*, 396 U.S. 909 (1969); *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961); *Yannicelli v. Nash*, 354 F. Supp. 143, 150-51 (D. N.J. 1972); *Little River Farms, Inc. v. United States*, 328 F. Supp. 476, 479 (N.D. Ga. 1971). *Compare United Sand & Gravel Contractors, Inc. v. United States*, 624 F.2d at 738-40 (even if Section 2410 waives immunity, it may not be utilized to circumvent statute of limitations provided for third-party attacks on wrongful levy under 26 U.S.C. §§ 7426, 6532(c)); *Falik v. United States*, 343 F.2d 38 (2d Cir. 1965) (no waiver of immunity under § 2410 for suit which attacks merits of underlying lien); *Quinn v. Hook*, 231 F. Supp. 718 (E.D. Pa. 1964), *aff'd*, 341 F.2d 920 (3d Cir. 1965) (Section 2410 does not waive immunity for collateral attack on validity of tax lien after adverse decision on issue by Tax Court).

Appellant's complaint seeks two remedies: damages, or, in the alternative, a writ of mandamus compelling the United States to convey the property to him and to void all prior deeds it had given. Appellant persists on appeal in asserting that the ultimate effect of his redemption, if permitted, will be to convey to him a title interest in the property. Appellant thus eschews restoration of that interest in the land which he previously held, namely an inferior security interest which he may not want, and instead seeks creation in himself of a title interest which he never previously possessed or claimed."

On the ground that the present action is not one to quiet title, we affirm the district court's ruling that jurisdiction does not exist under Section 2410. This conclusion renders it unnecessary for us to consider the district court's different rationale for dismissal, namely that the United States had sold its interest in the property at the time suit was brought." 520 F. Supp. at 1210.

---

[11]Appellant's alternative prayer is not unlike an action to quiet title on the basis of weakness in another's title rather than the strength of one's own title. The law does not permit quiet title relief in such circumstances. *Dudley v. Meyers*, 422 F.2d 1389, 1394-95 (3d Cir. 1970); *Mays v. Kirk*, 414 F.2d 131, 133 (5th Cir. 1969); (essential elements of cause of action to remove cloud on title are proof of plaintiff's own title and invalidity of instrument or record sought to be eliminated as a cloud).

[12]*But see Popp v. Eberlein*, 409 F.2d at 312 (although issue was not argued and although court expressed doubts, court held that § 2410 granted jurisdiction for suit against United States where United States had sold its interest in property through distraint sale prior to plaintiffs' suit, and where effect of plaintiffs' successful suit would be to set aside distraint sale); *Little River Farms, Inc. v. United States*, 328 F. Supp. 476 (N.D. Ga. 1971); *compare Aqua Bar & Lounge, Inc. v. United States Department of Treasury Internal Revenue Service*, 539 F.2d at 936, 937 (action could be characterized as action to quiet title within meaning of § 2410 where property rights in liquor license were sold by United States prior to plaintiff's suit, and where neither IRS nor third party purchaser had obtained physical possession of the license documents). *But see also Aqua*, 539 F.2d at 941-42, where Judge Garth, concurring, rejected an interpretation of § 2410 that would permit joinder of the United States after it had seized and sold subject property in order to satisfy its tax lien.

The district court's order and judgment of dismissal is affirmed for lack of subject matter jurisdiction. Our affirmance of the dismissal is without prejudice to any quiet title action appellant may choose to bring against parties other than the United States in an appropriate state forum.[14] *See* N.D. CENT. CODE § 32-17-91 (1976 Repl.).

A true copy.
Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

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[14]Where a motion to dismiss for lack of subject matter jurisdiction is granted on grounds of sovereign immunity, the court is left without power to render judgment on the merits of the case. *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1156-59 (5th Cir. 1981); *see also* C. Wright, *Federal Practice and Procedure*, § 1350 at 554 and n. 89 (1969).

Appendix B

James A. Murray,

Plaintiff,

v.

United States of America,

Defendant.

Civ. No. A3-80-111.

United States District Court,
D. North Dakota,
Southeastern Division.

Sept. 4, 1981.

Action was brought seeking to quiet title or in the alternative recovery of damages resulting from failure of the Internal Revenue Service to permit redemption of real property. The defendant United States claimed sovereign immunity and subsequent lack of subject matter jurisdiction. The District Court, Benson, Chief Judge, held that the doctrine of sovereign immunity barred action.

Action dismissed.

1. United States 125(3)

Without a waiver of sovereign immunity by the United States, jurisdiction is defective so that an action is barred.

2. United States 125(9)

Mandamus statute does not provide any waiver of sovereign immunity. 28 U.S.C.A. § 1361.

3. United States 125(22)

Doctrine of sovereign immunity barred an action seeking to quiet title or seeking in the alternative recovery of damages resulting from failure of the Internal Revenue Service to permit redemption of property sold at tax auction particularly since Unitted States, having sold the property and conveyed its interests, no longer claimed any interest in the property and the owner did not challenge the validity of the tax auction and received the required notice and a fair opportunity to submit a bid. 28 U.S.C.A. §§ 1340, 1346, 1346(b), 2410.

Armond G. Erickson, Tenneson, Serkland, Lundberg Erickson & Marcil, Ltd., Fargo, N.D., for plaintiff.

Lynn E. Crooks, Asst. U. S. Atty., James R. Britton, U. S. Atty., Fargo, N. D., for defendant.

MEMORANDUM AND ORDER

BENSON, Chief Judge.

This is an action seeking to quiet title or in the alternative, a recovery of damages resulting from a failure of the Internal Revenue Service (IRS) to permit a redemption of real property. The defendant United States, claiming sovereign immunity and subsequent lack of subject matter jurisdiction, moved to dismiss the complaint under Fed. R.Civ.P. 12(b) The plaintiff asserts jurisdiction under 28

U.S.C. §§ 1340, 2410, 1346, 1356 and 1361. For the reasons stated below, the motion is granted.

Background

For the purposes of this proceeding, the court will assume the following alleged facts to be true. On December 20, 1978, the plaintiff took a mortgage on real estate owned by Fireside, Inc. The mortgage was executed by Donald Paul, a large stockholder and president of the corporation, and duly recorded in the office of the Register of Deeds of Cass County on the same date.[1] The property was subject to a prior mortgage to the Casselton State Bank on which there was owing the sum of $92,130.07 and subject also to IRS tax liens and other judgment liens. IRS filed additional tax liens after December 20, 1978. On April 18, 1979, taxpayer's property was seized by the IRS for nonpayment of taxes. The property was later purchased by the United States at a tax auction for the amount of the statutory calculated bid. $301 84, *see* 26 U.S.C. § 6335(e)(1). The plaintiff did not bid at the auction nor does he challenge the validity of either the tax lien or the auction sale. On August 13 and December 9, 1979, the plaintiff sent letters to the IRS each enclosing a check for $320.00 (the amount of the government's purchase price plus some interest) and asking to redeem

[1]The United States alleges that the transaction did not create a valid mortgage in that the property of a corporation had been given by a shareholder to secure an individual debt of the shareholder. This court does not address the issue of whether the mortgage was valid.

the property. *See* 26 U.S.C. § 6337.[4] IRS officials on both occasions refused to permit the redemption and returned the checks. On December 27, 1979, the plaintiff filed a claim for damages with the IRS. In February 1980, the United States sold its interest in the property to the Casselton State Bank for $301.84.[5] The IRS denied the claim on April 1, 1980, and this action was commenced on September 30, 1980.

Jurisdiction

[1] It is well settled that the United States may not be sued without its consent. *Lynch v. United States*, 54 S.Ct. 840, 844 78 L.Ed. 1434, 292 U.S. 571, 581-82 (1934); *Bor-Son Building Corporation v. Heller*, 572 F.2d 174, 177 (8th Cir. 1978); *see also* 2A Moore's Federal Practice ¶8.17; 14 Wright & Miller & Copper Federal Practice and Procedure: Civil § 3654. Without a waiver of sovereign immunity by the United States, jurisdiction is defective so that the action is barred. *Id.* The plaintiff Murray pleads waiver and district court jurisdiction under a number of statutes. Plaintiff's claims that sections 1356 and 1361 provide a waiver of immunity in this case are without merit and can be disposed of without extensive discussion.

---

[4]Section 6337 provides in pertinent part:

> (b) *Redemption of real estate after sale.*
>
> (1) *Period.* The owner of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 120 days after the sale thereof.

[5]The complaint fails to specify the amount of the plaintiff's purported security interest and it is not necessary for the court to determine the priority of those interests.

The possibility of jurisdiction based on sections 1340, 2410 and 1346 requires closer scrutiny.

Under section 1356 "district courts shall have original jurisdiction . . . of any seizure under any law of the United States on land or upon water not within admiralty and maritime jurisdiction . . ." Although there has been limited case law interpreting the application of this section, it is evident that it has not been construed to either confer jurisdiction or to waive immunity in fact situations similar to those presented here. *See Hunsucker v. Phinney*, 497 F.2d 29 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975) (section 1356 is not applicable to confer jurisdiction in action to recover evidence illegally seized by IRS); *Johnston v. Earle*, 245 F.2d 793 (9th Cir. 1975) (section 1356 not applicable to confer jurisdiction in action for alleged seizure and conversion of a tractor by IRS officers); *Detwiler v. United States*, 406 F.Supp. 695 (E.D.Pa. 1975), *aff'd*, 544 F.2d 512 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1105, 97 S.Ct. 1136, 51 L.Ed.2d 557 (1977) (section 1356 not applicable to confer jurisdiction in action for damages allegedly caused by improper acts of IRS agents).

[2] The plaintiff's assertion of mandamus jurisdiction as provided under 28 U.S.C. § 1361 also must fail. It is apparent that Congress did not intend that this section provide any waiver of sovereign immunity. *Estate of Watson v. Blumenthal*, 586 F.2d 925, 934-35 (2nd Cir. 1978); *Hill v. United States*, 571 F.2d 1098, 1101 n.5 (9th Cir. 1978).

Sections 1340 and 2410

The plaintiff argues that jurisdiction and waiver of immunity are granted under 28 U.S.C. §§ 1340 and

2410. Section 1340 states that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. . " Under section 2410 Congress has waived sovereign immunity in suits to quiet title in real or personal property in which the United States has or claims a mortgage or other lien.[4] In order to sustain jurisdiction under these two sections it must be determined whether the facts at bar will invoke section 2410 waiver of immunity as it has been judicially construed. *See United States v. Coson*, 286 F.2d 453 (9th Cir. 1961); *Bank of Hawaii v. Benchwick*, 249 F.Supp. 74 (D.Hawaii 1966); *Bartell v. Riddell*, 202 F.Supp. 70 (S.D.Cal. 1962).

Generally, it is observed that an action can be characterized as a section 2410 quiet title action when: (1) the United States claims a mortgage or lien interest in the property, *see, e.g., Hudson County Board of Chosen Freeholders v. Morales*, 581 F.2d 379 (3rd Cir. 1978) (IRS tax lien challenged); *Viva Ltd. v. United States*, 490 F. Supp. 1002 (D.Colo. 1980); (same); *Commonwealth of Pennsylvania v. Petito*, 476 F.Supp. 384 (E.D.Pa. 1979) (same); *Bartell v. Riddell*, 202 F.Supp. 70 (S.D.Cal. 1962) (property sold twice by IRS but not yet conveyed); *compare*

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[4] 28 U.S.C. § 2410 provides in pertinent part:

> (a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—
> (1) to quiet title to,
> (2) to foreclose a mortgage or other lien upon,
> (3) to partition,
> (4) to condemn, or
> (5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.

above stated cases *with Trustee of the Puritan Church v. United States*, 294 F.2d 734 (D.C.Cir. 1961) (section 2410 does not waive immunity when the United States claims title) *and Zager v. United States*, 256 F.Supp. 396 (E.D.Wis. 1966) (same) *and Haggard v. Lancaster*, 320 F.Supp. 1252 (N.D.Miss. 1970) (no waiver in action to enjoin use of park for access to federal housing project); or (2) the United States no longer claims any interest in the property but the plaintiff challenges the validity of the tax auction sale, *see, e.g., Aqua Bar & Lounge, Inc. v. United States Department of Treasury*, 539 F.2d 935 (3rd Cir. 1976) (alleged improper procedures); *Reece v. Scoggins*, 506 F.2d 967 (5th Cir. 1975) (alleged failure to receive notice of sale); *Popp v. Eberlein*, 409 F.2d 309 (7th Cir. 1969), *cert. denied*, 396 U.S. 909, 90 S.Ct. 222, 24 L.Ed.2d 185 (1969) (alleged disparagement of title at the sale); *Little River Farms, Inc. v. United States*, 328 F. Supp. 476 (N.D.Ga. 1971) (alleged that sale was made on terms in variance from those advertised).

[3] In the present action, the United States, having sold the property and conveyed its interest, no longer claims any interest in the property. Additionally, the plaintiff does not challenge the validity of the tax auction. Apparently, the plaintiff received any required notice of the auction sale and had a fair opportunity to submit a bid. There is no indication that the plaintiff's opportunity to acquire the property was in any way infringed. Therefore, the availability of a fair opportunity to purchase the property critically distinguishes this case from the cases cited under the second criterion. In view of the lack of any precedent granting waiver under circumstances similar to those presented here and the prior availability of a remedy for the plaintiff, this court applies the strict con-

struction rule and finds no waiver under section 2410. *Haggard v. Lancaster, supra* at 1254-55; *see also* Hart & Wechsler, The Federal Courts and The Federal System, 1351-56 (1973).

Section 1346(b)

Plaintiff alternatively seeks jurisdiction based on a suit for damages under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Section 1346(b) grants the court jurisdiction

> of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The plaintiff alleges that the IRS acted improperly in its failure to permit the plaintiff to redeem the real property.

The court concludes that it is not necessary to reach the issue of whether the IRS acted properly. Under section 2680(c), Title 28, "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty" is specifically excepted from the waiver provisions of section 1346(b). In *American Association of Commodity Traders v. Department of Treasury*, 598 F.2d 1233 (1st Cir. 1979), the plaintiff taxpayer sought damages under section 1346(b), claiming that the IRS improperly refused to process the plaintiff's application for exempt status, *id.* at 1234. The court upheld the dismissal of the action ob-

serving that the alleged fault of the IRS agents was immaterial in that there was little doubt that the suit fell within the FTCA exclusion of claims under 2680(c). *Id.* at 1235. Similarly, the court in *Broadway Open Air Theatre v. United States,* 208 F.2d 257, 258 (4th Cir. 1953) upheld a dismissal of an action brought under § 1346(b). In *Broadway,* the court stated that the claim to recover money alleged to have been wrongfully received by the United States in payment of taxes, fell squarely within the broad and specific terms of exception 2680(c). *Id.* at 259. The claim was clearly one "arising in respect of the . . . collection of any tax," *id.* The court continued, stating that the plaintiff failed to assert that his action did not arise as a result of successful efforts of an agency of the United States to collect taxes. *Id.* Likewise, in the present action, plaintiff has failed to make the same assertion. *See also United States v. Banner,* 226 F.Supp. 904 (N.D.N.Y. 1963) (section 2680(c) bars action for conversion against United States). Therefore, the court holds that the action of the IRS officials in denying the plaintiff's demand falls within the protected assessment or collection activity defined in section 2680(c).

IT IS ORDERED that plaintiff's amended complaint and cause of action is dismissed for lack of subject matter jurisdiction.

Appendix C

Pueblo, Colorado
August 13, 1979

Gordon Sorum
Revenue Officer
Internal Revenue Service
P. O. Box 2461
Fargo, No. Dak. 58108

Dear Mr. Sorum:

As per our telephone conversation, enclosed find Cashiers Check for $320.00, payable to the Internal Revenue Service, for redemption of the Fireside at Buffalo, No. Dak. You advised the total needed to redeem the Fireside was $301.84 plus interest at 20% from June 8, 1979. The amount enclosed is more than sufficient to cover the amount with interest.

This redemption is being made on behalf of James A. Murray, Joan M. Murray and Justin L. Murray. As you know and as the records reflect, we do have a mortgage on the property and are eligible to redeem the property. We will expect to receive a Deed to the property shortly after October 8, 1979, unless other redemptions are made.

I appreciate your cooperation in this matter and should you have any questions, please contact me.

Sincerely,

James A. Murray
89 Cornell Circle
Pueblo, Colorado 81005

Phone:
(303) 566-1413 (home)
(303) 545-1836 (work)

Appendix D

Person to Contact
GORDON D. SORUM
Telephone Number
1-701-237-5771, ext. 179
Refer Reply to
CCLL:FB:GS
Date
August 23, 1979

James A. Murray
89 Cornell Circle
Pueblo, CO 81005

Dear Mr. Murray:

I am returning herewith cashier's check number 83511 drawn on the Pueblo Bank and Trust Company in the amount of $320.00. You sent this check to Revenue Officer Gordon Sorum on August 13 in an attempt to redeem the property formerly owned by the Fireside, Inc.

Mr. Sorum is on leave for two weeks and not available to respond to your letter.

As he informed you on July 9, 1979, when you came to this office, there was some questions as to the validity of the mortgage you hold against the Fireside property since it was executed in behalf of one officer of the Corporation for a personal debt. We have referred the matter to our legal staff and have not as yet received a response.

Until the matter has been resolved, it would be inappropriate for this office to retain your check. Mr. Sorum

will contact you as soon as we are advised regarding the Service's position on your mortgage.

/s/ Joyce L. Gasing
Group Manager

Enclosure
Cashier's check number 83511

Appendix E

Pueblo, Colorado
September 9, 1979

Gordon Sorum
Revenue Officer
Internal Revenue Service
P. O. Box 2461
Fargo, No. Dak. 58108

Dear Mr. Sorum:

Reference is made to my letter of August 13, 1979, and the reply from your office dated August 23, 1979. regarding our redemption of the Fireside at Buffalo, No. Dak.

We take a very strong position that we have a valid mortgage on the property and are eligible to redeem the property. Apparently you question our right to redeem the property based on the fact that our mortgage was only signed by Donald Paul as President of the Corporation.

I would refer you to volume 19 of American Jurisprudence 2nd wherein they discuss Corporations.

Section 1040 on page 500 states a corporate mortgage is not invalid by reason of any formal irregularities in its execution where it is consented to by its stockholders, or where the stockholders know of the irregularity but make no objection thereto or acquiese therein.

Section 1041 on page 501 states there is authority that a charter or general law requiring as prerequisite to a corporate mortgage the giving of the consent of a certain proportion of the stockholders is for the protection of the stockholders, and that if they waive the formalities pre-

scribed or acquiesce in such acts when informally done, no one else has the right to complain. For this reason a creditor is held to have no right to object to a mortgage of the property of a corporation because a statutory requirement of the consent of the stockholders to a mortgage is not strictly complied with.

This section goes on to state only the stockholders can complain of the failure of the corporation to comply with such a requirement.

I also refer you to Corporation in volume 19 of Corpus Juris Secundum which takes the same position.

Section 968 on page 423 states generally transactions executed in an unauthorized manner are voidable only, and not invalid, and that stockholders may attack the transaction.

Section 968 on page 424 states a corporate transaction or contract which is within the corporate powers, which is neither wrong in itself nor against public policy, but which is defective from the failure to observe in its execution a requirement of law enacted for the protection of a certain class, is voidable only, and is valid until avoided, not void until validated.

Section 1004 on page 471 states a corporation is frequently held bound by acts of a person owning all or substantially all of the stock.

Section 1009 on page 480 states ordinarily authority of an officer can be questioned only by an injured party, such as a stockholder or creditor. In this case it should be noted you were not injured by our mortgage.

We take the position our mortgage is valid and you have no right to attack it. As cited above, American Jurispru-

dence 2nd and Corpus Juris Secundum supports our position.

If you feel you have a valid reason for questioning our mortgage, please cite your authority.

I am returning Pueblo Bank and Trust Company Cashiers Check made payable to the Internal Revenue Service in the amount of $320.00 for redemption of the Fireside, and I will expect to receive a Deed to the property shortly after October 8, 1979.

Should you have any questions please let me know.

Sincerely,

/s/ James A. Murray
89 Cornell Circle
Pueblo, Colorado 81005

Phone:
(303) 566-1413 (home)
(303) 545-1836 (work)

Appendix F

Internal Revenue Service

Department of the Treasury
Person to Contact
Ed Foy, Jr.
Telephone Number
237-5771, ext. 340 (if local)
Return Reply to 1-800-342-4710 (toll free)
CATS:SPS:EF

October 4, 1979

James A. Murray
89 Cornell Circle
Pueblo, Colorado 81005

Dear Mr. Murray:

Re: Fireside, Inc.
Property Seizure/Sale

Returned herewith is Cashier's Check No. 83511, in the amount of $320.00, dated 8/13/79, drawn on the Pueblo Bank and Trust Company of Pueblo, Colorado.

You sent this remittance to revenue officer G. Sorum by letter at 8/13/79, for the purpose of exercising the Right of Redemption as a junior lienor to realty of the Fireside, Inc. The remittance was returned to you by correspondence from Joyce L. Gasing dated 8/23/79. You were advised that there were questions as to the validity of your mortgage on the Fireside property, that the matter had been referred to our legal staff and that you would be contacted by Mr. Sorum when we were apprised of our counsel's position.

You returned the remittance to Mr. Sorum by letter of 9/9/79, presenting reasons which you feel support the validity of your mortgage. That letter was presented to our counsel for additional evaluation.

I have now been advised by counsel that it is the position of the Government that your lien is not valid against the Fireside, Inc. realty. Your remittance is, therefore, being returned.

Sincerely,

/s/ Ed Foy, Jr.
Special Procedures Officer

Appendix G

1. U.S. Const., amend V., provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 26 U.S.C. §6337 provides as follows:

(a) Before sale.—Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary or his delegate at any time prior to the sale thereof, and upon such payment the Secretary or his delegate shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) Redemption of real estate after sale.—

(1) Period.—The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 120 days after the sale thereof.

(2) Price.—Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

(c) Record.—When any lands sold are redeemed as provided in this section, the Secretary or his delegate shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption.

3. 26 U.S.C. §6338 provides as follows:

(a) Certificate of sale.—In the case of property sold as provided in section 6335, the Secretary or his delegate shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property, such certificate shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor.

(b) Deed to real property.—In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time provided in section 6337, the Secretary or his delegate shall execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

(c) Real property purchased by United States.—If real property is declared purchased by the United States at a sale pursuant to section 6335, the Secretary or his delegate shall at the proper time execute a deed therefor, and without delay cause such deed to be duly recorded in the proper registry of deeds.

4 26 U.S.C. §6339 provides as follows:

(a) Certificate of sale of property other than real property.—In all cases of sale pursuant to section 6335 of property (other than real property), the certificate of such sale—

(1) As evidence.—Shall be prima facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale; and

(2) As conveyances.—Shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold; and

(3) As authority for transfer of corporate stock.—If such property consists of stocks, shall be notice, when received, to any corporation, company, or association of such transfer, and shall be authority to such corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not; and

(4) As receipts.—If the subject of sale is securities or other evidences of debt, shall be a good and valid receipt

to the person holding the same, as against any person holding or claiming to hold possession of such securities or other evidences of debt; and

(5) As authority for transfer of title to motor vehicle.—If such property consists of a motor vehicle. shall be notice, when received, to any public official charged with the registration of title to motor vehicles, of such transfer and shall be authority to such official to record the transfer on his books and records in the same manner as if the certificate of title to such motor vehicle were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(b) Deed of real property.—In the case of the sale of real property pursuant to section 6335—

(1) Deed as evidence.—The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title.—If the proceedings of the Secretary or his delegate as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

(c) Effect of junior encumbrances.—A certificate of sale of personal property given or a deed to real property executed pursuant to section 6338 shall discharge such property from all liens, encumbrances, and titles over which the lien of the United States with respect to which the levy was made had priority.

(d) Cross references.—

(1) For distribution of surplus proceeds, see section 6342(b).

(2) For judicial procedure with respect to surplus proceeds, see section 7426(a) (2).

5. 28 U.S.C. §1346 provides as follows:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607 (g)(1). 609(a)(1)]. For the purpose of this paragraph,

an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or section 7428 (in the case of the United

States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 7426, 7428, 7420].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

6. 28 U.S.C. §1361 provides as follows:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

7. 28 U.S.C. §2674 provides as follows:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

8. 28 U.S.C. §2680 provides as follows:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with

regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

9. N.D. Century Code §32-17-01 provides as follows:

Action to determine adverse claims.—An action may be maintained by any person having an estate or an inter-

est in, or lien or encumbrance upon, real property, whether in or out of possession thereof and whether such property is vacant or unoccupied, against any person claiming an estate or interest in, or lien or encumbrance upon, the same, for the purpose of determining such adverse estate, interest, lien, or encumbrance.

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-851

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES A. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

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JAMES A. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision below dismissing his suit against the United States on the ground that there is no statutory provision according jurisdiction to entertain such a suit.

The pertinent facts may be summarized as follows: On December 20, 1978, petitioner recorded in Cass County, North Dakota, a mortgage on certain real property owned by a delinquent taxpayer, Fireside, Inc. (Pet. App. A-2). The property was then subject to a prior mortgage, federal tax liens and several judgment liens (*ibid.*). On April 18, 1979, the Internal Revenue Service seized the property for nonpayment of taxes (Pet. App. A-2). The property was thereafter declared to have been purchased by the United States at a tax auction for $301.84, the minimum bid pursuant to Section 6335(e)(1) of the Internal Revenue Code of

1954 (26 U.S.C.) (Pet. App. A-2 to A-3). Petitioner did not bid at the sale and did not contest the validity of the tax liens or the regularity of the auction sale (Pet. App. A-3). As a purported holder of a junior mortgage, however, he attempted to redeem the property pursuant to Section 6337(b) of the 1954 Code by submitting $320, the amount necessary for redemption, to the Internal Revenue Service (Pet. App. A-3). The Internal Revenue Service returned petitioner's remittance, taking the position that his purported mortgage on the property was not valid (*ibid.*).[1]

Thereafter, on February 1, 1980, the United States sold its interest in the property to the first mortgagee, Casselton State Bank. Eight months later, petitioner brought this suit in the United States District Court for the District of North Dakota, seeking damages of $70,000 for the alleged wrongful refusal to accept his redemption offer or, alternatively, a writ of mandamus compelling the United States to convey the real property to him and to void all prior deeds it had given on the property. The district court dismissed the suit on the ground that the United States had not waived its sovereign immunity with respect to such claims (Pet. App. A-4).

The court of appeals affirmed (Pet. App. A-1 to A-13).[2] It held (1) that petitioner's claim for damages arose "in respect of the assessment or collection of [a] tax," and was therefore excluded, under 28 U.S.C. 2680(c), from the scope of the Federal Tort Claims Act (28 U.S.C. 1346(b)); (2) that various other jurisdictional provisions relied on by petitioner (28 U.S.C. 1331, 1340, 1356 and 1361) did not waive the

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[1]In making this determination, the Internal Revenue Service noted that the mortgage was given to petitioner as security for the personal debts of Fireside's principal shareholder and that the transaction had not been approved by Fireside's board of directors (Pet. App. A-3).

[2]The opinion of the court of appeals is reported at 686 F.2d 1320 (1982).

government's sovereign immunity; and (3) that petitioner's suit did not fall within the scope of 28 U.S.C. 2410 (providing for the maintenance of certain quiet title actions against the United States (Pet. App. A-4 to A-12).[3]

1. Abandoning any claim that this action is permitted under the quiet title provisions of 28 U.S.C. 2410,[4] petitioner now relies solely on the Federal Tort Claims Act and

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[3]The court of appeals noted that its affirmance of the district court's dismissal was without prejudice to any action petitioner might thereafter bring against parties other than the United States in an appropriate state court (Pet. App. A-13). It should be noted, however, that there is a typographical error in the court's opinion, citing the pertinent state statute as N.D. Cent. Code § 32-17-91 (repl. 1976), instead of N.D. Cent. Code § 32-17-01 (repl. 1976). That statute provides that "[a]n action may be maintained by any person having * * * [a] lien or encumbrance upon * * * real property * * * against any person claiming an estate or interest in, or lien or encumbrance upon, the same, for the purpose of determining such adverse estate, interest, lien, or encumbrance" (§ 32-17-01).

[4]The court of appeals based its decision as to 28 U.S.C. 2410 on the theory that petitioner could claim only a mortgage interest in the property and not title. See, e.g., *Samet* v. *United States*, 242 F. Supp. 214, 222-223 (M.D. N.C. 1964); *Russo* v. *United States*, 47 A.F.T.R.2d 434 (D. Ariz. 1980) (a redemption serves only to place all parties in their former status, thereby reviving any junior mortgage). The government, however, did not contend that the remedy provided by 28 U.S.C. 2410 was available only to persons claiming title and not to persons claiming security interests. At all events, it is clear that 28 U.S.C. 2410 applies, by its terms, only where the United States itself claims a "mortgage or other lien" against the property in question. Thus, it does not apply where, as here, a lien interest has been converted to title. See *Bank of Hemet* v. *United States*, 643 F.2d 661, 664 n.1 (9th Cir. 1981); *Trustees of the Puritan Church* v. *United States*, 294 F.2d 734 (D.C. Cir. 1961). As *Bank of Hemet* illustrates, the appropriate remedy in such circumstances is an action under 28 U.S.C. 2409a, which permits suits "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." But such an action would itself be appropriate only so long as the government was continuing to claim such an interest in property, and could not be commenced after the government had conveyed title to a third party. See *Bank of Hemet* v. *United States*, *supra*, 643 F.2d at 665.

the mandamus provisions of 28 U.S.C. 1361, as providing the statutory bases for maintaining this action (Pet. 7-10). It is well settled, however, that the mandamus provisions of 28 U.S.C. 1361 do not themselves constitute or operate as a waiver of sovereign immunity. See, e.g., *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 934-935 (2d Cir. 1978); *Hill* v. *United States*, 571 F.2d 1098, 1101 n.5 (9th Cir. 1978); *Essex* v. *Vinal*, 499 F.2d 226, 231-232 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975), and the cases cited therein. Thus, a suit for relief in the nature of mandamus could not properly be maintained, in any circumstances, against the United States itself.[5]

The courts below also correctly held that petitioner's claim for damages under the Federal Tort Claims Act was barred by 28 U.S.C. 2680(c), which provides that this remedy "shall not apply to * * * [a]ny claim arising in respect of the assessment or collection of any tax * * *." As the court of appeals noted, any right petitioner may have had to redeem the property under Section 6337(b)(1) arose only in connection with a tax levy, and was an integral part of such levy (Pet. App. A-6). Where, as here, property is deemed to have been purchased by the United States pursuant to Section 6335(e)(1), the ultimate objective of the government is not to own the property, but to sell the property so that the proceeds of sale can satisfy the outstanding tax liabilities. See Section 7506(d); S. Rep. No. 1708, 89th Cong., 2d Sess. 31 (1966). Accordingly, the

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[5]Even if an appropriate individual government officer had been named as a defendant, petitioner would still not be entitled to the requested relief because it would have been wholly beyond the power of any such officer to convey to petitioner any interest in the subject property, which had already been conveyed to a third party. At all events, petitioner would not be entitled to a deed to the property even if his redemption were effective (see note 4, *supra*). Thus, even apart from sovereign immunity, the requested mandamus relief would be inappropriate.

collection process remained incomplete in this case until the United States sold the property. In these circumstances, the court of appeals correctly held that Section 2680(c) bars petitioner's claim for damages.[6]

2. Petitioner also contends (Pet. 10-12) that even in the absence of any express statutory waiver of sovereign immunity, his cause of action against the United States is

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[6]Even if Section 2680(c) did not apply here, petitioner's suit would be barred by 28 U.S.C. 2680(a), which prohibits any tort claim against the United States that is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." By its terms, the redemption right provided by Section 6337(b) of the 1954 Code is conferred only on those persons "having" an interest in the subject property. Contrary to the petitioner's suggestion (Pet. 7 n.2) that the Internal Revenue Service must accept a tender offer in the correct amount from any person who *asserts* that he had such an interest, the statute implicitly requires that, in order to ascertain whether a proper redemption offer has been made, a determination must be made as to whether the asserted interest actually exists. The circumstances here (see note 1, *supra*) suggested that there was at least some question as to the validity of petitioner's asserted mortgage interest. Whether or not the determination made by the responsible officials that such a mortgage would not be recognized under state law was correct in this instance, the making of such a determination represents the kind of function that Congress intended to protect under 28 U.S.C. 2680(a). Cf. *American Association of Commodity Traders* v. *Department of the Treasury*, 598 F.2d 1233, 1235 (1st Cir. 1979).

Moreover, even apart from the effect of these statutory exceptions to the scope of the Federal Tort Claims Act, that Act permits damages to be sought from the government only to the extent that a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Petitioner has cited no authority for the proposition that a private person who rejects a redemption offer would be subject to tort liability under North Dakota law. Moreover, his reliance (Pet. 8) on *Guthrie* v. *Curnutt*, 417 F.2d 764 (10th Cir. 1969), is misplaced. The court there did not allow the recovery of damages, but only provided an adjudication as to the effectiveness of a redemption offer.

supported by implication under the Due Process Clause of the Fifth Amendment. But claims in excess of $10,000 based on an alleged deprivation or taking of property contrary to the Fifth Amendment may be asserted in the United States Claims Court under the Tucker Act, 28 U.S.C. (Supp. V) 1491. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-127 (1974). Accordingly, there is no reason for extending the scope of the district court's jurisdiction over such claims, which is limited to those claims that do not exceed $10,000. 28 U.S.C. 1346(a)(2).[7]

Moreover, there is no basis for petitioner's contention (Pet. 10-11) that he was deprived of property without due process. Insofar as that contention relates to the loss of his junior mortgage rights, as a result of the sale of the property to the United States (see Section 6339(c)), the requirements of due process are satisfied by the notice provisions of Section 6335(d) of the 1954 Code, which provide junior lienholders a fair opportunity to protect their interests by bidding at the tax sale. For whatever reasons he may have had, petitioner failed to avail himself of this opportunity to protect his asserted interest in the property here in question. Since the redemption right conferred by Section 6337(b) is exclusively a creature of federal statute, not itself required by the Due Process Clause or any other provision of the Constitution, there is no constitutional bar against any limitations Congress may choose to impose on the manner in which the right of redemption might be enforced. See *Davis* v. *Passman*, 442 U.S. 228, 241 (1979).

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[7] *Davis* v. *Passman supra*, upon which petitioner relies (Pet. 11), is distinguishable. At issue there was whether an individual could be sued on the basis of an "implied" cause of action under the Due Process Clause of the Fifth Amendment. The decision there does not deal with the entirely different question whether the United States could properly be named as a party to such a suit except as expressly authorized by statute.

At all events, there would have been no bar against petitioner's bringing an action against the United States for a determination of his rights pursuant to 28 U.S.C. 2409a, if such a suit had been instituted during the period between the refusal of the redemption offer and the ultimate sale of the property to Casselton State Bank (see note 4, *supra*). Even though it is now too late for petitioner to proceed in this regard, it is possible that he could seek redress against the ultimate purchaser of the property under North Dakota law on the theory that the redemption tender effectively revived his mortgage interest in the property. See note 3, *supra*.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1982

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[8]Petitioner contends (Pet. 10 n.5) that Section 6339(c) would bar a suit against the ultimate purchaser. That provision, however, deals with the effect of a certificate of sale issued to the purchaser at the tax sale pursuant to Section 6335. It does not purport to govern the effect of a subsequent sale by the tax sale purchaser on the intervening rights arising on a redemption under Section 6337(b). It is, of course, possible that the North Dakota courts would nevertheless hold that the bank acquired title free and clear of any claims that might be based on redemption offers that were not accepted by the Internal Revenue Service. But it is difficult to understand how the bank could have acquired any better title than the government had. Thus, if petitioner could have successfully challenged the title held by the United States had he brought a timely action under 28 U.S.C. 2409a, it would seem that he could pursue the same remedy against the bank or its transferees in a quiet title proceeding under state law.